

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LEE INGLE,
Appellant,

vs.

CLETUS J. FITZHARRIS,
Superintendent,
Appellee.

No. 21093

APPELLEE'S BRIEF

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FILED

OCT 24 1966

WM. B. LUCK, CLERK

NOV 4 1966

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
SUMMARY OF APPELLEE'S ARGUMENT	3
ARGUMENT	
I. THE DISTRICT COURT WAS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING.	3
II. APPELLANT MADE A KNOWING AND VOLUNTARY WAIVER OF COUNSEL.	4
III. APPELLANT WAS NOT DENIED COMPULSARY PROCESS FOR OBTAINING WITNESSES.	7
CONCLUSION	8

TABLE OF CASES

	<u>Page</u>
<u>Brown v. Allen</u> 344 U.S. 443 (1953)	4
<u>Nelson v. People of State of California</u> 346 F.2d 73 (9th Cir. 1965)	4
<u>People v. Ingle</u> 53 Cal.2d 407 (1960)	4,5,6,7
<u>Townsend v. Sain</u> 372 U.S. 293 (1963)	3

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, USC § 2241. The jurisdiction of this court is conferred by Title 28, USC § 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals, when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Petitioner was convicted in 1958 of both possession and sale of marijuana. Thereafter, his conviction was reversed by the California District Court of Appeal, Third District, upon the ground that the incriminating evidence found upon this person was illegally seized. See People v.

Ingle, 343 P.2d 780 (1959). However, the opinion of the District Court of Appeal was vacated by the granting of a hearing by the California Supreme Court. Thereafter, on January 19, 1960, the California Supreme Court affirmed the conviction in an opinion which dealt not only with the search and seizure question, but with the contention that the petitioner was deprived of his constitutional right to counsel and his right to the process of court to compel the attendance of witnesses. See People v. Ingle, 53 Cal.2d 407, 348 P.2d 577 (1960).

Thereafter, petitioner sought writs of habeas corpus in both the Superior Court of Monterey County and the California District Court of Appeal, First District, Division Two. Petitioner raised in both petitions essentially the same points he now presents to this Court. Both petitions were denied (CT 35).

B. Proceeding in the Federal Court

On October 29, 1965, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California (see CT 1, 25). An Order to Show Cause was issued and on December 27, 1965, appellee filed a Return to the Order to Show Cause (CT 18). On January 10, 1966, appellant filed a Traverse to the Return (CT 54).

On February 15, 1966, the District Court issued an

order discharging the Order to Show Cause and denying appellant's petition (CT 67). On March 14, 1966, appellant filed a petition for rehearing (CT 69) which petition was denied on April 5, 1966 (CT 73). A timely notice of appeal was filed by appellant on April 13, 1966 (CT 74). On May 20, 1966, an order was entered granting the appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis (CT 81).

SUMMARY OF APPELLEE'S ARGUMENT

- I. The District Court was not required to hold an evidentiary hearing.
- II. Appellant made a knowing and voluntary waiver of counsel.
- III. Appellant was not denied compulsory process for obtaining witnesses.

ARGUMENT

I.

THE DISTRICT COURT WAS NOT REQUIRED
TO HOLD AN EVIDENTIARY HEARING.

Appellant complains that the District Court, presented with his petition asserting denials of constitutional rights, erred in not ordering an evidentiary hearing. Appellant relies on Townsend v. Sain, 372 U.S. 293 (1963), which holds that on petition for habeas corpus when the facts are in dispute, the federal court must hold an evidentiary hear-

ing if the petitioner did not receive a full and fair hearing in the state court. However, that decision, like its predecessor, Brown v. Allen, 344 U.S. 443 (1953), does not require a District Court to hold a hearing on every habeas corpus application, but only when the basic historical facts are an issue. Respondent submits that in the instant case the basic facts are not in dispute. Therefore in such a situation, the need for a District Court hearing is obviated. See also Nelson v. People of State of California, 346 F.2d 73 (9th Cir. 1965).

II.

APPELLANT MADE A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHT TO COUNSEL.

Appellant contends that his waiver of his right to counsel was not voluntary because the actions of his court appointed counsel nullified his freedom of choice. Following an independent examination of the record, the District Court found appellant's contentions to be without merit, and agreed with the findings of the California Supreme Court (see CT 68). In People v. Ingle, 53 Cal.2d 407 at pages 416-417 the California Supreme Court said:

"Ingle's contention that he was deprived of his constitutional right to counsel lacks substance here.

The record shows that Attorney Barcroft, an experienced member of the bar, was appointed by the court to represent

Ingle in February, 1958. The same attorney was appointed to represent codefendants Garcia and Adame, defendant Sondra Ingle being represented by other private counsel. At the arraignment on March 7, 1958, Garcia pleaded guilty. Barcroft, appearing with and on behalf of Ingle and Adame, asked for a week's continuance and for the appointment of other counsel. The request was denied. No representation was made to the court then or at subsequent appearances in court of Ingle, Adame and Barcroft on March 14, March 17, and April 18 in connection with setting the trial date, that there was any objection to Barcroft's representation of these two defendants or that there was any conflict of interest in their respective defenses. [Emphasis added.] A few days before the May 22 trial date Ingle and Adame informed Barcroft that they no longer wanted him to represent them, and that they would defend themselves rather than have his continued representation. At the commencement of the trial Barcroft advised the court of this situation, and asked to be relieved of responsibility. The court carefully questioned, cautioned, and advised each of the defendants as to the peril involved in this decision upon their part. Each stated that he wanted to proceed on his own behalf. [Emphasis added.]

"Ingle relies on People v. Robinson, 42 Cal.2d 741,

745-747 [269 P.2d 6], and Glasser v. United States, 315 U.S. 60, 75-76 [62 S.Ct. 457, 86 L.Ed. 680], in support of his contention that he was deprived of the undivided assistance of counsel, and that a choice between having counsel representing conflicting interests and the accused representing himself was not really a free choice. This is not a case in which a trial court has appointed joint counsel over objection on the ground of diversity of interest between the co-defendants. [Citations omitted.] Nor was counsel forced upon two nonconsenting defendants. Here counsel had requested on unspecified grounds that he be relieved of his appointment over two months before trial. Ingle had several opportunities in court to express his dissatisfaction with counsel, to indicate that there might be some conflict of interest, or to request a postponement of the trial date as set, to obtain independent counsel. When he did object on the morning of the trial he did not indicate that the interests of himself and Adame were in conflict, and the circumstances were not such as to indicate to the trial judge that there was any conflict. When the right to counsel has been freely and intelligently waived, an accused has not been deprived of the right to representation by counsel. [Citation omitted.] The dilatory tactic indulged in by



Ingle in this matter is of itself sufficient from which to imply a waiver of right to independent counsel. [Citation omitted.]"

After a close examination of the record the California Supreme Court rejected petitioner's contention and the Federal District Court after an independent examination of the record did likewise. Appellee urges that the opinion and conclusion of these courts should be adopted.

III.

APPELLANT WAS NOT DENIED COMPULSARY PROCESS FOR OBTAINING WITNESSES.

Appellant raised this same contention before the California Supreme Court. After due consideration of the record, that court rejected the argument by saying at page 417:

"With reference to the claimed denial of the appellant's right to the process of court to compel the attendance of witnesses, the clerk's transcript contains a document entitled 'Request for Subpoenas' which lists the names of several persons. It is unsigned. No request was made at the trial for a continuance to secure the attendance of Garcia or of any other witness. The record is devoid of anything to show that the trial court was at any time cognizant of or refused to honor the request for process." People v. Ingle, supra, at 417.

Appellant made no request to the court for process to obtain any further witnesses, nor did he in any way bring the matter to the attention of the court, thus, appellee submits that appellant's contention herein must be rejected.

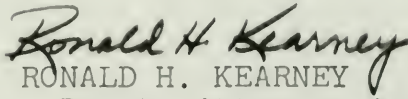
CONCLUSION

For the foregoing reasons, the appellee respectfully submits that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: October 20, 1966.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October 20, 1966.


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